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CHAPTER IX

NURSING FACILITY SANCTIONS

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CHAPTER IX

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CHAPTER IX NURSING FACILITY SANCTIONS

INTRODUCTION

In accordance with § 1919(h) of the Social Security Act, 42 CFR § 488.400, and the requirements of the Virginia General Assembly, the Department of Medical Assistance Services (DMAS) has promulgated the regulations, which are set forth below. These regulations specify the enforcement procedures and remedies to be initiated upon a finding that a nursing home (NF) is not in substantial compliance with the requirements for participation in the Medicaid program.

12VAC30-10-751. ENFORCEMENT OF COMPLIANCE FOR NURSING FACILITIES.¹

A. The Commonwealth shall comply with the Medicaid Program requirements of 42 CFR 488.300 et seq.

B. Notification of enforcement remedies. When taking an enforcement action against a nonstate operated nursing facility, the state provides notification in accordance with 42 CFR 488.402(f).

1. The notice (except for civil money penalties and state monitoring) specifies:
 - a. The nature of noncompliance;
 - b. Which remedy is imposed;
 - c. The effective date of the remedy; and
 - d. The right to appeal the determination leading to the remedy.
2. The notice for civil money penalties is in writing and contains the information specified in 42 CFR 488.434.
3. Except for civil money penalties and state monitoring, notice is given at least two calendar days before the effective date of the enforcement remedy for immediate jeopardy situations and at least 15 calendar days before the effective date of the enforcement remedy when immediate jeopardy does not exist. The two-day and 15-day notice periods begin when the facility receives the notice, but, in no event will the effective date of the enforcement action be later than 20 calendar days after the notice is sent. (42 CFR 488.402(f)(3),(4), (5))
4. Notification of termination is given to the facility and to the public at least two calendar days before the remedy's effective date if the noncompliance constitutes immediate jeopardy and at least 15 calendar days before the remedy's effective date if the

¹ This regulation corresponds to § 4.35 of the *State Plan for Medical Assistance*.

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noncompliance does not constitute immediate jeopardy. The state must terminate the provider agreement of a nursing facility in accordance with procedures in 42 CFR Parts 431 and 442. (42 CFR 488.456(c) and (d)).

C. Factors to be considered in selecting remedies. In determining the seriousness of deficiencies, the state considers the factors specified in 42 CFR 488.404(b)(1) and (2).

D. Application of remedies.

1. If there is immediate jeopardy to resident health or safety, the state terminates the nursing facility's provider agreement within 23 calendar days from the date of the last survey or immediately imposes temporary management to remove the threat within 23 days. (42 CFR 488.410)

2. The state imposes the denial of payment (or its approved alternative) with respect to any individual admitted to a nursing facility that has not come into substantial compliance within three months after the last day of the survey. (42 CFR 488.417(b)(1) and § 1919(h)(2)(C) of the Act)

3. The state imposes the denial of payment for new admissions remedy as specified in 42 CFR 488.417 (or its approved alternative) and a state monitor as specified at 42 CFR 488.422, when a facility has been found to have provided substandard quality of care on the last three consecutive standard surveys. (42 CFR 488.414 and § 1919(h)(2)(D) of the Act)

4. The state follows the criteria specified at 42 CFR 488.408(c)(2), (d)(2), and (e)(2) when it imposes remedies in place of or in addition to termination. (42 CFR 488.408(b) and § 1919(h)(2)(A) of the Act)

5. When immediate jeopardy does not exist, the state terminates a nursing facility's provider agreement no later than six months from the finding of noncompliance if the conditions of 42 CFR 488.412(a) are not met.

E. Available remedies. The state has established the remedies defined in 42 CFR 488.406(b).

1. Termination;
2. Temporary management;
3. Denial of payment for new admissions;
4. Civil money penalties;
5. Transfer of residents; transfer of residents with closure of facility; and
6. State monitoring. 12VAC30-20-251 through 12VAC30-20-259 describe the criteria for applying the above remedies, plan of correction, nursing facility appeals, and repeated substandard quality of care.

F. In the event that the Commonwealth and HCFA disagree on findings of noncompliance or application of remedies in a nonstate operated nursing facility or a dually participating facility when there is no immediate jeopardy, such disagreement shall be resolved in

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accordance with the provisions of 42 CFR 488.452 (1995).

G. The Commonwealth shall have the authority to apply one or more remedies for each deficiency constituting noncompliance or for all deficiencies constituting noncompliance.

H. As set forth by 42 CFR 488.454(d), remedies shall terminate on the date that HCFA or the Commonwealth can verify as the date that substantial compliance was achieved and the facility has demonstrated that it could maintain substantial compliance once the facility supplies documentation acceptable to HCFA or the Commonwealth that it was in substantial compliance and was capable of remaining in compliance.

12VAC30-20-251. ENFORCEMENT OF COMPLIANCE FOR NURSING FACILITIES: TERMINATION OF PROVIDER AGREEMENT. ²

A. Mandatory termination. As set forth by 42 CFR 488.408 (1995), the Commonwealth shall (i) impose temporary management on the nursing facility; (ii) terminate the nursing facility's provider agreement; or (iii) impose both of these remedies when there are one or more deficiencies that constitute immediate jeopardy to resident health or safety. In addition, the Commonwealth shall terminate the nursing facility's provider agreement when the nursing facility fails to relinquish control to the temporary manager, or in situations when a facility's deficiencies do not pose immediate jeopardy, if the nursing facility does not meet the eligibility criteria for continuation of payment set forth in 42 CFR 488.412(a) (1995).

B. The Commonwealth shall have the authority to terminate a nursing facility's provider agreement if such nursing facility:

1. Is not in substantial compliance with the requirements of participation, regardless of whether or not immediate jeopardy is present; or
2. Fails to submit an acceptable plan of correction within the timeframe specified by the Commonwealth. For purposes of this section, substantial compliance shall be defined as meaning a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.

C. Situations without immediate jeopardy. If a nursing facility's deficiencies do not pose immediate jeopardy to residents' health or safety, and the facility is not in substantial compliance, the Commonwealth shall have the authority to terminate the nursing facility's provider agreement or allow the nursing facility to continue to participate for no longer than six months from the last day of the survey agency's survey if:

1. The survey agency finds that it is more appropriate to impose alternative remedies than to terminate the nursing facility's provider agreement;
2. The Commonwealth has submitted a plan and timetable for corrective action approved

² This regulation corresponds to Attachment 4.35-B to the *State Plan for Medical Assistance*.

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by HCFA; and

3. The facility in the case of a Medicare skilled nursing facility or Commonwealth in the case of a Medicaid nursing facility agrees to repay to the federal government payments received after the last day of the survey that first identified the deficiencies if corrective action is not taken in accordance with the approved plan of correction.

D. Effect of termination. Termination of the provider agreement shall end payment to the nursing facility.

E. Patient transfer. The Commonwealth shall provide for the safe and orderly transfer of residents when the facility's provider agreement is terminated.

F. Continuation of payments to a facility with deficiencies. As set forth by 42 CFR 488.450:

1. The Commonwealth shall have the authority to terminate the nursing facility's provider agreement before the end of the correction period if the following criteria are not met: (i) the survey agency finds that it is more appropriate to impose alternative remedies than to terminate the nursing facility's provider agreement; (ii) the Commonwealth has submitted a plan and timetable for corrective action which has been approved by HCFA; and (iii) the Commonwealth has agreed to repay the federal government payments received under this provision if corrective action is not taken in accordance with the approved plan and timetable for corrective action.

2. Cessation of payments. If termination is not sought, either by itself or with another remedy or remedies, or any of the criteria of subdivision 1 of this subsection are not met or agreed to by either the facility or the Commonwealth, the facility or the Commonwealth shall receive no federal Medicaid payments, as applicable, from the last day of the survey.

3. Period of continued payments. If the criteria of subdivision 1 of this subsection are met, HCFA may continue payments to the Commonwealth for a Medicaid facility with noncompliance that does not constitute immediate jeopardy for up to six months from the last day of the survey. If the facility does not achieve substantial compliance by the end of this six-month period, the Commonwealth shall have the authority to terminate its provider agreement.

12VAC30-20-252. ENFORCEMENT OF COMPLIANCE FOR NURSING FACILITIES: TEMPORARY MANAGEMENT.³

A. Temporary management in cases of immediate jeopardy. In accordance with 42 CFR 488.408 (1995) and 42 CFR 488.410 (1995), the Commonwealth shall (i) impose temporary management on the nursing facility; (ii) terminate the nursing facility's provider agreement; or (iii) impose both of these remedies when there are one or more deficiencies that constitute immediate jeopardy to resident health or safety. For purposes of this section,

³ This regulation corresponds to Attachment 4.35-C to the *State Plan for Medical Assistance*.

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temporary management shall mean the temporary appointment by HCFA or the Commonwealth of a substitute facility manager or administrator with authority to hire, terminate, or reassign staff, obligate nursing facility funds, alter nursing facility procedures, and manage the nursing facility to correct deficiencies identified in the nursing facility's operation. The individual appointed as a temporary manager shall meet the qualifications of 42 CFR 488.415(b) (1995) and be compensated in accordance with the requirements of 42 CFR 488.415(c) (1995). The Commonwealth shall notify the facility that a temporary manager is being appointed. In situations of immediate jeopardy, the Commonwealth shall also have the authority to impose other remedies, as appropriate, in addition to termination of the provider agreement and temporary management. In a nursing facility or dually participating facility, if the Commonwealth finds that such nursing facility's or facility's noncompliance poses immediate jeopardy to resident health or safety, the Commonwealth shall notify HCFA of such finding.

B. Temporary management in situations of no immediate jeopardy. When there are widespread deficiencies that constitute actual harm that is not immediate jeopardy, the Commonwealth shall have the authority to impose temporary management in addition to the remedies of denial of payment for new admissions or civil money penalties of \$50 to \$3,000 per day.

C. Failure to relinquish authority to temporary management.

1. Termination of provider agreement. If a nursing facility fails to relinquish authority to the temporary manager, the Commonwealth shall terminate the nursing facility's provider agreement within 23 calendar days of the last day of the survey if the immediate jeopardy is not removed. If the facility fails to relinquish control to the temporary manager, state monitoring may be imposed pending termination of the provider agreement. If the facility relinquishes control to the temporary manager, the Commonwealth must notify the facility that, unless it removes the immediate jeopardy, its provider agreement shall be terminated within 23 calendar days of the last day of the survey. A nursing facility's failure to pay the salary of the temporary manager shall be considered a failure to relinquish authority to temporary management.

2. Duration of temporary management. Temporary management shall end when any of the conditions specified in 42 CFR 488.454(c) (1995) are met. For purposes of this section, substantial compliance shall mean a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.

12VAC30-20-253. ENFORCEMENT OF COMPLIANCE FOR NURSING FACILITIES: DENIAL OF PAYMENT FOR NEW ADMISSIONS. ⁴

A. Denial of payment for new admissions. The Commonwealth shall (i) deny payment for new admissions; (ii) impose civil money penalties of \$50 to \$3,000 per day; or (iii) impose

⁴ This regulation corresponds to Attachment 4.35-D to the *State Plan for Medical Assistance*.

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both of these remedies when there are widespread deficiencies that constitute no actual harm with a potential for more than minimal harm but not immediate jeopardy, or one or more deficiencies that constitute actual harm that is not immediate jeopardy. As set forth by 42 CFR 488.417 (1995), the Commonwealth shall deny payment for new admissions when a nursing facility is not in substantial compliance three months after the last day of the survey identifying the noncompliance, or the survey agency has cited a nursing facility with substandard quality of care on the last three consecutive standard surveys. As set forth by 42 CFR 488.417, the Commonwealth shall have the authority to deny payment for all new admissions when a facility is not in substantial compliance. For the purposes of this section, a new admission shall be defined as a resident who is admitted to the facility on or after the effective date of a denial of payment remedy and, if previously admitted, has been discharged before that effective date. Residents admitted before the effective date of the denial of payment, and taking temporary leave, are not considered new admissions, nor subject to the denial of payment. Also for the purposes of this section, substantial compliance shall mean a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.

B. Denial of payment for substandard quality of care on last three surveys. As set forth by 42 CFR 488.414 and 42 CFR 488.417 (1995), if a facility is found to have provided substandard quality of care on the last three consecutive standard surveys, regardless of other remedies provided, the Commonwealth shall deny payment for all new admissions and shall impose state monitoring until such facility demonstrates to the satisfaction of the Commonwealth that it is in substantial compliance with all requirements and will remain in substantial compliance with all requirements.

C. The Commonwealth shall have the authority to deny payment for new admissions for any deficiency except when the facility is in substantial compliance.

12VAC30-20-254. ENFORCEMENT OF COMPLIANCE FOR NURSING FACILITIES: CIVIL MONEY PENALTY.⁵

A. Immediate jeopardy. In situations of immediate jeopardy, the Commonwealth shall have the authority to impose (in accordance with 42 CFR 488.430 through 42 CFR 488.444) a civil money penalty in the range of \$3,050 to \$10,000 in addition to the remedies of imposing temporary management or terminating the nursing facility's provider agreement. In imposing civil money penalties, the Commonwealth shall comply with all provisions of 42 CFR 488.430 through 488.444 (1995).

B. No immediate jeopardy. In accordance with 42 CFR 488.430 through 42 CFR 488.444, the Commonwealth shall (i) deny payment for new admissions; (ii) impose civil money penalties of \$50 to \$3,000 per day; or (iii) impose both of these remedies when there are widespread deficiencies that constitute no actual harm with a potential for more than minimal harm but not immediate jeopardy, or one or more deficiencies that constitute actual harm that is not immediate jeopardy.

⁵ This regulation corresponds to Attachment 4.35-E to the *State Plan for Medical Assistance*.

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C. Notice. Either HCFA or the Commonwealth, as appropriate, shall send a prior written notice of the penalty to the facility as set forth by 42 CFR 488.434 (1995).

D. The Commonwealth shall have the authority to impose civil money penalties of \$50 to \$3,000 per day to any deficiency except when the nursing facility is in substantial compliance. If the Commonwealth imposes a civil money penalty for a deficiency that constitutes immediate jeopardy, the penalty must be in the range of \$3,050 to \$10,000 per day. For the purposes of this section, substantial compliance shall mean a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.

12VAC30-20-255. ENFORCEMENT OF COMPLIANCE FOR NURSING FACILITIES: STATE MONITORING. ⁶

A. In accordance with 42 CFR 488.422 (1995), the Commonwealth shall directly monitor the delivery of services for nursing facilities to have isolated deficiencies that constitute no actual harm with a potential for more than minimal harm but not immediate jeopardy, or found to have a pattern of deficiencies that constitute no actual harm with a potential for more than minimal harm but not immediate jeopardy. As set forth by 42 CFR 488.408(c)(3) (1995), the Commonwealth shall have the authority to impose state monitoring at any time to any deficiency except when the facility is in substantial compliance. As set forth by 42 CFR 488.414 (1995), if a facility is found to have provided substandard quality of care on the last three consecutive standard surveys, regardless of other remedies provided, the Commonwealth shall deny payment for all new admissions and shall impose state monitoring as specified in 42 CFR 488.422 until such facility demonstrates to the satisfaction of the Commonwealth that it is in substantial compliance with all requirements and will remain in substantial compliance with all requirements. For purposes of this section, a new admission shall be defined as a resident who is admitted to the facility on or after the effective date of a denial of payment remedy and, if previously admitted, has been discharged before that effective date. Residents admitted before the effective date of the denial of payment, and taking temporary leave, are not considered new admissions, nor subject to the denial of payment. For the purposes of this section, substantial compliance shall mean a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm.

B. For state monitoring, no prior notice shall be required of the Commonwealth to the nursing facility.

12VAC30-20-256. ENFORCEMENT OF COMPLIANCE FOR NURSING FACILITIES: TRANSFER OF RESIDENTS; TRANSFER OF RESIDENTS WITH CLOSURE OF FACILITY. ⁷

⁶ This regulation corresponds to Attachment 4.35-F to the *State Plan for Medical Assistance*.

⁷ This regulation corresponds to Attachment 4.35-G to the *State Plan for Medical Assistance*.

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A. The Commonwealth shall arrange for the safe and orderly transfer of Medicare and Medicaid nursing facility residents when the provider agreement with the nursing facility is terminated.

B. In an emergency, the Commonwealth shall have the authority to transfer Medicare and Medicaid residents to another facility, or close the facility and transfer the Medicare and Medicaid residents to another facility.

12VAC30-20-257. ENFORCEMENT OF COMPLIANCE FOR NURSING FACILITIES: REQUIRED PLAN OF CORRECTION.⁸

A. In accordance with 42 CFR 488.408(f) (1995), a nursing facility found to have a deficiency with regard to a program requirement shall submit a plan of correction for approval by the Commonwealth without regard to the remedies which are imposed or the seriousness of the identified deficiencies. A nursing facility shall not be required to submit a plan of correction when it has been found to have deficiencies that are isolated that the Commonwealth determines have only a potential for minimal harm but no actual harm has occurred.

B. For the purposes of this section, a plan of correction shall mean a plan developed by the nursing facility or the appointed temporary manager and approved by HCFA or the state survey agency that describes the actions the nursing facility will take to correct deficiencies and specifies the date by which those deficiencies will be corrected.

12VAC30-20-258. ENFORCEMENT OF COMPLIANCE FOR NURSING FACILITIES: APPEALS.⁹

A. Nursing facility appeal rights. As set forth by 42 CFR 488.408(g) (1995), a nursing facility for which deficiencies have been identified may appeal a certification of noncompliance leading to an enforcement remedy.

B. Appeal limits. As set forth by 42 CFR 488.408(g) (1995), nursing facilities may not appeal the Commonwealth's choice of the remedy to be applied, including the factors considered by the Commonwealth or HCFA in selecting the remedy specified in 42 CFR 488.404.

12VAC30-20-259. ENFORCEMENT OF COMPLIANCE FOR NURSING FACILITIES: REPEATED SUBSTANDARD QUALITY OF CARE.¹⁰

Any remedies or sanctions which may be imposed by the Commonwealth pursuant to 42 CFR 488.414(a) shall be imposed in accordance with the requirements set forth by 42 CFR 488.414(b) through 488.414(e) and 488.454(b).

⁸ This regulation corresponds to Attachment 4.35-I to the *State Plan for Medical Assistance*.

⁹ This regulation corresponds to Attachment 4.35-J to the *State Plan for Medical Assistance*.

¹⁰ This regulation corresponds to Attachment 4.35-K to the *State Plan for Medical Assistance*.